

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 1007
SPONSOR(S): Kravitz
TIED BILLS: HB 1005

Judicial Conference; Rules of Court Practice and Procedure
IDEN./SIM. BILLS: SJR 1942

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	5 Y, 3 N	Kramer	Kramer
2) Justice Appropriations Committee			
3) Justice Council			
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

This joint resolution proposes to amend Article V, Section 2 of the Florida Constitution, relating to the Supreme Court's authority to adopt rules of practice and procedure. The joint resolution would amend the Florida Constitution to make the process of adopting rules of practice and procedure relating to violations of criminal law, violations of criminal law by juveniles and postconviction proceedings, similar to the process used to create rules of practice and procedure for the federal courts. The bill would not alter the Supreme Court's authority to adopt rules of practice and procedure in other areas of the law.

The constitutional amendment would create a judicial conference to propose rules of procedure governing violations of criminal law, violations of criminal law by juveniles and postconviction proceedings. Rules proposed by the judicial conference will be submitted to the Supreme Court for consideration. The Supreme Court will then submit proposed rules to the Legislature by November 30 of the year preceding the effective date of the proposed rule. The Legislature may adopt, reject or amend proposed rules by general law. If the legislature does not act by the end of the next legislative session, the proposed rule will be deemed approved.

The joint resolution also provides that a court may not require or authorize collateral or postconviction judicial review of a criminal judgment or sentence except as provided by general law or rule of procedure adopted in accordance with the amendment. It also provides that rules of practice and procedure may not be inconsistent with general law and shall not abridge, enlarge, or modify any substantive right.

If this joint resolution is passed by a 3/5 vote of both houses of the legislature, it will be submitted to the voters in the general election in November of 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The joint resolution would amend the constitution to create a judicial conference to propose rules of practice and procedure.

B. EFFECT OF PROPOSED CHANGES:

Constitutional Authority: Article V, Section 2 of the Florida Constitution, authorizes the Supreme Court to "adopt rules of practice and procedure in all courts . . ." The Florida Supreme Court has adopted rules of practice and procedure governing various subjects. For example, there are rules of civil procedure, rules of judicial administration, rules of criminal procedure, rules of worker's compensation procedure, probate rules, and rules of juvenile procedure. The same section of the constitution authorizes the Legislature to repeal court rules of procedure with a 2/3 vote of the membership of both houses.

Separation of Powers: Unlike the federal constitution, the Florida constitution includes a specific provision pertaining to the separation of powers among the three branches of government. Article II, Section 3 of the Florida Constitution provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The Supreme Court has held that it has exclusive authority to enact rules of practice and procedure in all courts. The Legislature's authority to enact substantive law is also exclusive.¹

The Florida Supreme Court can protect itself against legislative encroachments on its authority by declaring such enactments an unconstitutional violation of the separation of powers provision. The Legislature's means of shielding the substantive law it passes from alteration by court rule of procedure is by repealing the rule of procedure.² The constitution does not preclude the Supreme Court from reenacting a rule that is similar or identical to one that the Legislature has repealed.³

Distinguishing Substance from Procedure: Generally speaking, "substantive law" involves matters of public policy affecting the authority of government and rights of citizens relating to life, liberty and property. Court "rules of practice and procedure" govern the administration of courts, and the behavior of litigants within a court proceeding.⁴

¹ See Art. III, s. 1, Fla. Const.; *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000); *Johnson v. State*, 336 So.2d 93 (Fla. 1976).

² See *Allen*, *supra* at n. 2.

³ See *id.*

⁴ In *Allen v. Butterworth*, the Florida Supreme Court referred to a discussion explaining the distinction between substance and procedure from Justice Adkins' concurring opinion in *In Re Rules of Criminal Procedure*, 272 So.2d 65,66 (Fla. 1972):

Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.

Comparison with the Federal System: Federal courts have acknowledged for some time that Congress has the authority to regulate matters of practice and procedure in the federal courts.⁵ Congress delegated some of its rulemaking power to the Supreme Court of the United States in 1934 by passing the Rules Enabling Act,⁶ which gave the Supreme Court the authority to promulgate rules of practice and procedure for federal courts. Notwithstanding this delegation of authority, however, Congress plays a critical role in implementing any rule proposals offered by the Court. All rule proposals are subject to review by Congress and take effect only after the Supreme Court has presented them to Congress, and after Congress has had seven months to review proposed rules or changes.⁷ Congress uses the review period to "make sure that the action under the delegation squares with the Congressional purpose."⁸ In fact, the federal statute currently provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right."⁹

Although Congress has authorized the Court to exercise some of legislative authority to regulate the courts, Congress may at any time amend or abridge by statute the Federal Rules of Civil Procedure, Rules of Appellate Procedure, Rules of Evidence, or other federal procedural rules promulgated under the Rules Enabling Act.¹⁰

Rules are proposed by the Judicial Conference of the United States and reviewed by the Supreme Court who, if they approve, forward them to Congress by May 1st.¹¹ If Congress does not reject, modify, or defer the rules, they take effect as a matter of law on December 1st of the year proposed.¹²

In construing the language in an earlier state constitution (which was similar to the current Florida constitutional provision) relating to rules of practice and procedure,¹³ the Florida Supreme Court noted:

Unlike the Act of Congress in providing that the Supreme Court of the United States may promulgate rules for the district courts, Section 3 of Article V, *supra*, failed to specify that such rules as might be promulgated by this court "shall neither abridge, enlarge, nor modify the substantive rights of any litigant"; however, such limitation is implicit by reason of Article II of our Constitution providing for a separation of the powers of government of this state."¹⁴

Comparison to Larger States: The rulemaking provisions of the three states with populations larger than Florida—California, New York and Texas—were examined to compare Florida's system with theirs. In all three states, their legislatures play an active role in, and have the final word on, the shape of court rules.

In California, the state constitution specifically requires that "[t]he rules adopted shall not be inconsistent with statute."¹⁵ As a result, rules of procedure that are inconsistent with statute are null and void.¹⁶ They also have a committee responsible for promulgating rules called the "Judicial

⁵ See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

⁶ Pub. L. No. 73-415, 48 Stat. 1064 (June 19, 1934). The current version of the Rules Enabling Act, as subsequently amended, is codified as 28 U.S.C. §§ 2071-2077.

⁷ See 28 U.S.C. § 2074.

⁸ *Sibbach*, 312 U.S. at 15.

⁹ Title 28 U.S.C. § 2072(b).

¹⁰ See 28 U.S.C. § 2071.

¹¹ See 28 U.S.C. §§ 2074 and 2075. The Judicial Conference is chaired by the Chief Justice of the United States Supreme Court and consists of the chief judges of the 13 appellate circuits, the chief judge of the Court of International Trade, and other selected federal judges.

¹² See *id.*

¹³ Article V, s. 3, Fla. Const. (1885), as amended by HJR 810 (1955), adopted 1956, provided: "The practice and procedure in all courts shall be governed by rules adopted by the supreme court."

¹⁴ *State v. Furen*, 118 So.2d 6, 12 (Fla. 1960).

¹⁵ Article VI, § 6(d), Cal. Const.

¹⁶ California courts have stated that rules of procedure promulgated by their state Judicial Council are subordinate to statutes enacted by the Legislature; if the two conflict, either in letter or merely intent, the court rule is invalid. See *Cooper v. Westbrook Torrey Hills, LP*, 97 Cal.Rptr.2d 742 (Cal. App. 4 Dist. 2000); *In re Jermaine B.*, 26 Cal.Rptr.2d 612 (Cal.

Council.” However, the Judicial Council itself promulgates rules, and the state supreme court does not approve such rules.

In New York, rules of practice and procedure that have statewide application are passed by the Legislature like statutes.¹⁷ The state Judicial Conference serves only in an advisory role.¹⁸

In Texas, the state Supreme Court is responsible under the constitution to promulgate rules of civil procedure and rules for judicial administration that are not inconsistent with state law.¹⁹ Although the Supreme Court has authority to promulgate such rules, they are subject to legislative control if the legislature chooses to exercise it.²⁰ Criminal rules of procedure are provided by statute.²¹

Effects on legislature of rulemaking authority being vested in court:

In 2003, the Florida Supreme Court created Florida Rule of Juvenile Procedure 8.350 and made it “effective immediately.”²² The rule created a new substantive right to counsel that was not constitutionally required, not statutorily authorized, and not funded by the Legislature.²³ The rule provides that if a dependent child disagrees with the Department of Children and Families’ motion to place the child into a residential treatment program, the court must appoint a lawyer to represent the child. This rule would apply exclusively to situations where the child was seriously emotionally disturbed.²⁴ As a result of the court rule, the guardian ad litem (“GAL”) of such a child is placed in an adversarial position with a court appointed attorney. Unlike the GAL (who must act in the best interest of the child) the court-appointed lawyer is to represent the “stated position” of the emotionally disturbed child. In deciding to create this new substantive right, the Supreme Court stated:

[W]e recognize the strong policy reasons raised by the comments in favor of appointment of an attorney for a dependent child in order to ensure that the child has a meaningful opportunity to be heard (e.g., the importance of an attorney-client privileged relationship between the child and counsel, and the therapeutic benefits that representation would provide to the child).²⁵
(emphasis added)

In preparation for approving the rule, the court asked the Department of Children and Family Services (“DCF”) to comment on sources of funding for lawyers appointed by the court to provide the representation mandated by the court rule.²⁶ DCF pointed out that there was no provision in the state budget, county budgets, or budget for the Florida courts, for the payment of attorney’s fees required under the rule.²⁷ The court nevertheless identified as a possible funding source funds already

App. 3 Dist. 1994). This applies not only to statutes in effect when a rule was adopted, but also to statutes enacted subsequently. See *Trans-Action Commercial Investors, Ltd. v. Jelinek*, 70 Cal.Rptr.2d 449 (Cal. App. 1 Dist. 1997). Therefore, corrective legislation would effectively repeal an inconsistent court rule, and require the promulgation of a new rule of procedure consistent with the new statute.

¹⁷ See generally N.Y. CIVIL PRACTICE LAW; N.Y. CRIMINAL PROCEDURE LAW.

¹⁸ See N.Y.L. 1978, ch. 156, § 6; N.Y. JUDICIARY LAW § 214-a.

¹⁹ See Art. V, § 31, Tex. Const.

²⁰ See *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Cr. App. 1990).

²¹ See Art. V, § 31, Tex. Const.

²² *Amendments to the Rules of Juvenile Procedure*, 842 So.2d 763, 768 (Fla. 2003).

²³ Justices Wells and Harding dissented from the view that the Court has the authority to establish a policy that counsel be appointed by rule of procedure where there was no constitutional or statutory requirement.

²⁴ Currently, a dependent child may be placed by the Department of Children and Families into a residential treatment center only after verification by a qualified evaluator (psychologist or psychiatrist) that residential mental health treatment is clinically appropriate, and that available less restrictive treatment modalities have been considered. As part of the assessment for the suitability of the child for residential placement, the evaluator must make written findings of fact which include that the child appears to have an emotional disturbance serious enough to require residential treatment, and is reasonably likely to benefit from such treatment. Section 39.407(5), F.S. There were 518 of such placements from 2000 to 2001.

²⁵ *Amendments to the Rules of Juvenile Procedure*, 842 So.2d at 765.

²⁶ Comments filed by DCF, February 15, 2002, at 1 and 2.

²⁷ See *id.* at 24.

appropriated for legal representation in Chapter 39 proceedings.²⁸ DCF estimated that the cost to implement the proposed rule would be over \$1,000,000 annually.²⁹

The exclusive authority of the Florida Supreme Court over court practice and procedure has impacted the ability of the Legislature to address the time delays in the administration of the death penalty.³⁰ The Legislature currently has no authority to limit how many postconviction motions can be filed in a capital case and cannot limit the amount of time that a defendant has to file a motion.³¹ In a special session held in 2000, the legislature passed the Death Penalty Reform Act of 2000 (DPRA) which imposed a statute of limitations on post-conviction death penalty appeals and provided that the postconviction process would begin while the case was on direct appeal – thereby moving up the start of that part of the appeals process.³² The statute of limitations in the DPRA provided that appeals filed after the deadline would be time-barred.³³ Shortly thereafter, the Florida Supreme Court found the DPRA unconstitutional.³⁴ The court held: “. . . we find that the DPRA is an unconstitutional encroachment on this Court’s exclusive power to “adopt rules for the practice and procedure in all courts.”³⁵ The Supreme Court rejected the state’s argument that if Congress has the authority to set a statute of limitations in death penalty postconviction motions, that the Florida Legislature should also have the same authority.³⁶ The court noted that:

In Florida, article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to adopt rules of procedure. Consequently, the separation of powers argument raised in the present case would never be an issue in the federal system. Unlike the Florida Constitution, the federal constitution does not expressly grant the United States Supreme Court the power to adopt rules of procedure.³⁷

Joint resolution: This joint resolution proposes amending Article V, section 2 of the Florida Constitution relating to the Supreme Court’s rulemaking authority. The joint resolution proposes to amend the state constitution to:

- provide for the creation of a judicial conference to propose rules of practice and procedure governing *violations of criminal law, violations of criminal law for juveniles and postconviction proceedings*;
- provide that the membership of the conference is to be composed according to general law;
- provide that the conference shall adopt rules governing its proceedings and that meetings of the conference shall be open to the public and provide opportunity for comment;
- provide that rules proposed by the conference shall be submitted to the supreme court for consideration;
- provide that unless otherwise provided by general law, the supreme court shall submit proposed rules to the legislature by November 30 of the preceding the effective date of the proposed rule;
- authorizes the legislature to adopt, reject or amend the proposed rules by general law;

²⁸ *Amendments to the Rules of Juvenile Procedure*, 842 So.2d at 765

²⁹ DCF comments at 8.

³⁰ “Postconviction” motions are brought after the conviction and sentence have been affirmed on appeal or the time for filing an appeal has expired. The most frequent issue alleged in such motions are claims of ineffective assistance of counsel.

³¹ See *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000)

³² Chapter 2000-3, L.O.F. One of the clauses in the bill’s preamble read: “WHEREAS, in order for capital punishment to be fair, just, and humane for both the family of victims and for offenders, there must be a prompt and efficient administration of justice following any sentence of death ordered by the courts of this state, . . .”

³³ See *id.*

³⁴ See *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000).

³⁵ *Id.* at 53. The court also found a section of bill setting a standard for filing a successive motion violated due process and equal protection requirements.

³⁶ See *id.* at 63. The federal statute discussed was the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, codified at 28 U.S.C. §§ 2244 and 2255.

³⁷ *Id.* at 63.

- provide that if the legislature takes no action upon a proposed rule by adjournment of the next legislative session, the rule shall be deemed approved and unless and until adopted by general law or as provided by the subjection, rules proposed by judicial conference shall have no force or effect;
- provide that a court may not require or authorize collateral or postconviction judicial review of a criminal judgment or sentence except as authorized by general law or rule of postconviction procedure;
- require that rules or practice and procedure shall not be inconsistent with general law, and shall not abridge, enlarge, or modify any substantive right;
- provide that rules of practice and procedure may be repealed by general law.

The bill would not alter the Supreme Court's authority to authority to adopt rules of practice and procedure in other areas of the law. If passed by the Legislature, the joint resolution would be placed before the voters for approval or rejection in the November 2006 general election.

C. SECTION DIRECTORY:

This is a joint resolution which is not divided by sections.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This joint resolution proposes a constitutional amendment which, if approved by the voters, would create a judicial conference with certain responsibilities. The joint resolution specifies that the membership of the conference is to be established by general law. As such, the fiscal impact of the creation of the judicial conference is indeterminate at this time.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

This is a legislative joint resolution, which is one of the methods for proposing, approving or rejecting amendments to the Florida Constitution.³⁸ The joint resolution requires passage by a three-fifths vote of the membership of each house of the Legislature. The proposed constitutional amendment must be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records. If approved by a majority of the electors voting on the question, the proposed amendment becomes effective on the Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

³⁸ See Art. XI, Fla. Const. (providing for amendment by legislative joint resolution, constitution revision commission proposal, citizen initiative, and constitutional budget or tax commission proposal).